US WEST COMMUNICATIONS, INC., Plaintiff,
v.
MINNESOTA PUBLIC UTILITIES COMMISSION, Edward A. Garvey, Chairman, Joel Jacobs, Commissioner, Marshall Johnson, Commissioner, Gregory Scott, Commissioner, and Don Storm, Commissioner (In Their Official Capacities as Past or Present Commissioners of the Minnesota Public Utilities Commission); and AT & T Wireless Services, Inc., Defendants.

No. CIV. 98-914 ADMAJB.

United States District Court, D. Minnesota.

March 30, 1999.

Incumbent local exchange carrier (ILEC) requested judicial review of interconnection agreement provision approved by Minnesota Public Utility Commission. The District Court, Montgomery, J., held that: (1) finding that ILEC should compensate calls terminated at wireless company's mobile switching center at tandem switch rate, rather than end-office switch rate, was not arbitrary or capricious; (2) ILEC could be required to construct, at wireless company's request and expense, new facilities needed to provide interconnection at any technically feasible point within ILEC's network; (3) Commission lacked authority to regulate telephone directory publisher; (4) ILEC could be required to make its recording and billing services available to wireless company to facilitate company's collection of termination charges when third party originated calls that transited ILEC's network and were then terminated on company's network; and (5) ILEC's taking claim was not yet ripe for adjudication.

Request granted in part and denied in part.

[1] TELECOMMUNICATIONS ⇐ 267
372k267
State commissions arbitrating disputes between incumbent local exchange carriers (ILEC) and competing local exchange carriers (CLEC) over interconnection agreements are limited to arbitrating open issues raised by parties themselves. Telecommunications Act of 1996, 47 U.S.C.A. § 252(c).

[2] TELECOMMUNICATIONS ⇐ 461.5
372k461.5
Minnesota Public Utility Commission's finding that incumbent local exchange carrier (ILEC) should compensate calls terminated at wireless company's mobile switching center at tandem switch rate, rather than end-office switch rate, was not arbitrary or capricious; center performed functions comparable to both types of landline switches and covered area comparable to tandem switch. Telecommunications Act of 1996, 47 U.S.C.A. § 252(d)(2)(A).

[3] STATUTES ⇐ 212.6
361k212.6
Presumptively, identical words used in different parts of same act are intended to have same meaning.

[4] TELECOMMUNICATIONS ⇐ 267
372k267
"Necessary" equipment for interconnection, for which incumbent local exchange carrier (ILEC) has statutory duty to provide physical collocation, is more narrowly defined than equipment which is merely "useful" for interconnection. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(6).

[5] TELECOMMUNICATIONS ⇐ 461.5
372k461.5
Minnesota Public Utility Commission had authority to require incumbent local exchange carrier (ILEC) to construct, at wireless company's request and expense, new facilities needed to provide interconnection at any technically feasible point within ILEC's network. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(2)(B).

[6] TELECOMMUNICATIONS ⇐ 269
372k269
Minnesota Public Utility Commission's state law authority to regulate public utility telephone companies did not extend to

affiliated company which published telephone directories. M.S.A. § 237.23.

[7] TELECOMMUNICATIONS ⚿ 267
372k267
Company which published telephone directories was not covered entity under Telecommunications Act.
Telecommunications Act of 1996, 47 U.S.C.A. §§ 153(26), 251(b)(3).

[8] TELECOMMUNICATIONS ⚿ 267
372k267
Minnesota Public Utility Commission lacked authority to require telephone directory publisher to treat incumbent local exchange carrier (ILEC) and its competitors the same with respect to yellow page advertising and white page directory listings.

[9] TELECOMMUNICATIONS ⚿ 461.5
372k461.5
Minnesota Public Utility Commission had authority to resolve, in arbitration proceeding, any open issues parties were unable to resolve in negotiations for interconnection agreement, so long as resolution did not violate or conflict with Telecommunications Act.
Telecommunications Act of 1996, 47 U.S.C.A. §§ 251, 252(b)(4)(C), (c).

[10] TELECOMMUNICATIONS ⚿ 461.5
372k461.5
Minnesota Public Utility Commission had authority to require incumbent local exchange carrier (ILEC) to make its recording and billing services available to wireless company to facilitate company's collection of termination charges when third party originated calls that transited ILEC's network and were then terminated on company's network; even though issue was not covered in Telecommunications Act, it was open issue between parties, was expressly presented to Commission for resolution, and Commission's resolution did not violate or conflict with Act.
Telecommunications Act of 1996, 47 U.S.C.A. §§ 251, 252(b)(4)(C), (c).

[11] ADMINISTRATIVE LAW AND PROCEDURE ⚿ 462
15Ak462
When Congress establishes burden of proof or production to be applied in administrative proceedings, courts must defer to Congress; however, when Congress is silent as to issue, it is left to judiciary to resolve question.

[12] TELECOMMUNICATIONS ⚿ 461.5
372k461.5
Minnesota Public Utility Commission, when arbitrating open issues from interconnection agreement negotiations between incumbent local exchange carrier (ILEC) and wireless company, properly placed burden of production and persuasion with respect to all issues of material fact upon ILEC, except to extent that company had control of critical information regarding issue in dispute.

[13] EMINENT DOMAIN ⚿ 286
148k286
Federal district court, reviewing Public Utility Commission's resolution of open issues from interconnection agreement negotiations between incumbent local exchange carrier (ILEC) and wireless company, had jurisdiction to hear ILEC's claim that physical collocation requirement imposed by Commission was unconstitutional taking without just compensation. U.S.C.A. Const.Amend. 5; Telecommunications Act of 1996, 47 U.S.C.A. § 252(e)(6).

[14] EMINENT DOMAIN ⚿ 277
148k277
In order for takings claim to be ripe: (1) administrative agency must have reached final, definitive position as to how it will apply regulation at issue, and (2) plaintiff must have attempted to obtain just compensation through procedures provided by State. U.S.C.A. Const.Amend. 5.

[15] EMINENT DOMAIN ⚿ 70
148k70
Takings Clause is not meant to limit government's ability to interfere with individual's property rights, but rather to ensure compensation when legitimate interference that amounts to taking occurs. U.S.C.A. Const.Amend. 5.

[16] EMINENT DOMAIN ⚿ 74

148k74
Compensation does not have to precede taking in order to satisfy Takings Clause; Clause is satisfied so long as process for obtaining compensation exists at time of taking. U.S.C.A. Const.Amend. 5.

[17] EMINENT DOMAIN ⇐ 2(1.1)
148k2(1.1)
In determining whether interconnection agreement between incumbent local exchange carrier (ILEC) and competing local exchange carrier (CLEC) constitutes taking of ILEC's property without just compensation, issue is whether any provision or provisions of agreement negatively affect overall operation of the ILEC to such degree that it can no longer receive fair rate of return from its investment. U.S.C.A. Const.Amend. 5.

[18] EMINENT DOMAIN ⇐ 277
148k277
Incumbent local exchange carrier's (ILEC) claim that interconnection agreement with competing local exchange carrier (CLEC) constituted taking of ILEC's property without just compensation was not ripe for judicial review because ILEC had not yet exhausted state law opportunities to have its rates adjusted. U.S.C.A. Const.Amend. 5.

***970** Geoffrey P. Jarpe and Martha J. Keon, Maun & Simon, PLC; Kevin J. Saville, U.S. West Communications, Inc.; and Wendy M. Moser, Norton Cutler, and Blair A. Rosenthal, U.S. West, Inc., for Plaintiff U.S. West Communications, Inc.

Dennis D. Ahlers and Megan J. Hertzler, Assistant Attorneys General, for Defendants MPUC and the Commissioners.

Mark J. Ayotte and Darrin M. Rosha, Briggs and Morgan, P.A., for Defendant AT & T Wireless Services, Inc.

MEMORANDUM OPINION AND ORDER

MONTGOMERY, District Judge.

Plaintiff U.S. West Communications, Inc., ("US West") brought this action pursuant to the Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), specifically 47 U.S.C. § 252(e)(6), seeking judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). US West has named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual commissioners and the MPUC, itself, will be referred to collectively as the MPUC.

The above-captioned case is one of eight cases involving review of determinations made by the MPUC presently before this Court. On December 10, 1997, this Court issued an Order in US WEST Communications, Inc. v. Garvey, No. 97-913 ADM/AJB, slip op. at 3 (D.Minn. Dec. 10, 1997), determining the scope of review for cases brought pursuant to § 252(e)(6). The Court found the scope of review limited to an appellate review of the record established before the MPUC. Id. On May 1, 1998, the Court filed an Order addressing the standard of review in the eight Telecommunications Act cases. AT & T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998). Questions of law will be subject to de novo review while questions of fact and mixed questions of fact and law will be subject to the arbitrary and capricious standard. Id. at 11-13.

***971** I. BACKGROUND

Before 1996, local telephone companies, such as U.S. West, enjoyed a regulated monopoly in the provision of local telephone services to business and residential customers within their designated service areas. AT&T Communications of Southern States v. BellSouth Telecomms., Inc., 7 F.Supp.2d 661, 663 (E.D.N.C.1998). In exchange for legislative approval of this scheme, the local monopolies ensured universal telephone service. Id. During this monopolistic period, the local telephone companies constructed extensive telephone networks in their service areas. Id.

Congress passed the Telecommunications Act

of 1996, in part, to end the monopoly of local telephone markets and to foster competition in those markets. Iowa Utilities Bd. v. FCC, 120 F.3d 753, 791 (1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999); GTE North, Inc. v. McCarty, 978 F.Supp. 827, 831 (citing Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 104-458, at 113 (1996)). Because the local monopolies, or incumbent local exchange carriers ("ILECs" or "incumbent LECs"), had become so entrenched over time through their construction of extensive facilities, Congress opted "not to simply issue a proclamation opening the markets," but rather constructed a detailed regulatory scheme to enable new competitors to enter the local telephone market on a more equal footing. AT & T Communications of the Southern States, 7 F.Supp.2d at 663. The Act obligates the incumbent LECs, like U.S. West: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it (interconnection); (2) to provide competing carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell any telecommunication service to competing carriers at a wholesale rate so that the competing carriers can resell the service (resale). Iowa Utils. Bd., 120 F.3d at 791 (citing 47 U.S.C.A. § 251(c)(2)-(4)). In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiation and arbitration. 47 U.S.C. § 252. Two sections of the Act, 47 U.S.C. §§ 251 and 252, explain the basic structure of the overall scheme for opening up the local markets.

Section 251

Section 251 describes the three relevant classes of participants effected by the Act: (1) telecommunications carriers, (2) local exchange carriers, and (3) incumbent local exchange carriers. 47 U.S.C. § 251(a), (b), and (c). A telecommunications carrier is a provider of telecommunications services, 47 U.S.C. § 153(44), telecommunication services being "the offering of telecommunications for a fee directly to the public ...," 47 U.S.C. § 153(46), and telecommunications being "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Both U.S. West and Defendant AT & T Wireless Services, Inc., ("AWS") qualify as telecommunications carriers. A local exchange carrier ("LEC") is "any person that is engaged in the provision of telephone exchange service or exchange access," 47 U.S.C. § 153(26), within an exchange area. 47 U.S.C. § 153(47). An incumbent local exchange carrier is a company that was an existent local exchange carrier on February 8, 1996, and was deemed to be a member of the exchange carrier association. 47 U.S.C. § 252(h). In this action, only U.S. West qualifies as an incumbent LEC.

Section 251 establishes the duties and obligations of these categories of participants. For example, all telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications ***972** carriers," 47 U.S.C. § 251(a); local exchange carriers have a duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." 47 U.S.C. § 251(b); and incumbent LECs have a duty to negotiate in good faith with telecommunications carriers seeking to enter the local service market, as well as a duty to "offer for resale at wholesale prices any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c). Section 251 requires an incumbent LEC to provide interconnection that is at least equal in quality to that provided by the incumbent LEC to itself at any technically feasible point, 47 U.S.C. § 251(c)(2); to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, 47 U.S.C. § 251(c)(3); and to provide for physical collocation of equipment necessary for interconnection or access to

unbundled network elements at the premises of the local exchange carrier. 47 U.S.C. § 251(c)(6).

Section 252

Section 252 delineates the procedures for the negotiation, arbitration, and approval of an interconnection agreement that permits a new carrier's entry into the local telephone market. 47 U.S.C. § 252. Once an incumbent LEC receives a request for an interconnection agreement from a new carrier, the parties can negotiate and enter into a voluntary binding agreement without regard to the majority of the standards set forth in § 251 of the Act. 47 U.S.C. § 252(a). If the parties cannot reach an agreement by means of negotiation, after a set number of days, a party can petition a State commission, here the MPUC, to arbitrate unresolved open issues. 47 U.S.C. § 252(b)(1).

An interconnection agreement adopted by either negotiation or arbitration must be submitted for approval to the State commission. 47 U.S.C. § 252(e)(1). The State commission must act within 90 days after the submission of an agreement reached by negotiation or after 30 days of an agreement reached by arbitration. 47 U.S.C. § 252(e)(4). The State commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1).

FCC Regulations

47 U.S.C. § 251(d)(1) directs the FCC to promulgate regulations implementing the Act's local competition provisions within six months of February 8, 1996. "Unless and until an FCC regulation is stayed or overturned by a court of competent jurisdiction, the FCC regulations have the force of law and are binding upon state PUCs [Public Utility Commissions] and federal district courts." AT&T Communications of California v. Pacific Bell, 1998 WL 246652, at *2 (N.D.Cal. May 11, 1998) (citing Anderson Bros. Ford. v. Valencia, 452 U.S. 205, 219-20, 101 S.Ct. 2266, 68 L.Ed.2d 783 (1981)). Review of FCC rulings is committed solely to the jurisdiction of the United States Court of Appeals pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

On August 8, 1996, the FCC issued its First Report and Order, which contains the Agency's findings and rules pertaining to the local competition provisions of the Act. Iowa Utils., Bd., 120 F.3d at 792 (citing First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order")). Soon after the release of the First Report and Order, incumbent LECs and State Commissions across the country filed motions to stay the implementation of the Order, in whole or in part. The cases were consolidated in front of the Eighth Circuit. In Iowa Utilities Board, the Eighth Circuit decided that "the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service." Id. The Eighth Circuit ***973** also vacated the FCC's "pick and choose" rule as being incompatible with the Act. Id. at 801. Other provisions of the First Report and Order were upheld by the Eighth Circuit.

On August 8, 1996, the FCC also promulgated the Second Report and Order, which contains additional FCC comments and regulations concerning provisions of the Telecommunications Act of 1996 that were not addressed in the First Report and Order. The People of the State of California v. FCC, 124 F.3d 934, 939 (8th Cir.1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). Again many local exchange carriers and state commissions filed suit challenging the order. Several cases were combined in front of the Eighth Circuit, which issued another order addressing the FCC's rules. Id.

On January 25, 1999, the Supreme Court reversed a significant portion of the Eighth Circuit's decisions. AT & T Corp. v. Iowa Utils. Bd., 119 S.Ct. at 721. The Supreme Court ruled that the FCC does have jurisdiction to implement local pricing rules and the FCC's rules governing unbundled access, with the exception of Rule 319, are

consistent with the Act. Id. at 738. In addition, the Supreme Court upheld the FCC's "pick and choose" rule as a reasonable, and possibly the most reasonable, interpretation of § 252(i) of the Act. Id.

Procedural History

In this case, AWS, a Commercial Mobile Radio Service ("CMRS"), sent a letter dated October 3, 1996, to U.S. West making a request for the partes to negotiate an Interconnection Agreement pursuant to the Act. (A1, Ex. 1). The parties failed to reach accord on all issues and AWS petitioned the MPUC for arbitration on March 7, 1997.(A1). In its Petition for Arbitration, AWS noted eleven open issues for arbitration. (A1; Petition for Arbitration at 7-23). On April 1, 1997, U.S. West submitted its response to the MPUC. (A7).

On April 17, 1997, the MPUC granted AWS's petition and established procedures for the arbitration. (A11; MPUC Order Granting Petition at 1-5). The MPUC referred the matter to the Office of Administrative Hearings [FN1] to designate an Administrative Law Judge (ALJ) to conduct the arbitration proceedings and issue a recommendation. (A11; MPUC Order Granting Petition at 4). In its order, the MPUC noted that the Minnesota Department of Public Service ("DPS") [FN2] and the Residential Utilities Division of the Office of the Attorney General ("RUD-OAG") [FN3] had a right under state law to intervene in all MPUC proceedings. (A11; MPUC Order Granting Petition at 6).

FN1. The Office of Administrative Hearings is an independent state agency which employs administrative law judges to conduct impartial hearings on behalf of other state agencies. Minn.Stat. §§ 14.48 and 14.50.

FN2. The Minnesota Department of Public Service is a state agency charged with the responsibility of investigating utilities and enforcing state law governing regulated utilities, as well as enforcing the orders of the MPUC. The DPS is authorized to intervene as a party in all proceedings before the MPUC. Minn.Stat. § 216A.07.

FN3. The Attorney General of Minnesota is "responsible for representing and furthering the interests of residential and small business utility consumers through participation in matters before the Public Utilities Commission involving utility rates and adequacy of utility services to residential or small business utility consumers." Minn.Stat. § 8.33, subd. 2.

The MPUC ordered that: "The burden of production and persuasion with respect to all issues of material fact shall be on U.S. WEST. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute." (A11; MPUC Order Granting Petition at 10). The MPUC reasoned that the federal Telecommunications Act and the Minnesota Telecommunications Act of 1995 ***974** are designed to create competitive entry into the local telephone market and placing the burden of proof on U.S. West facilitates this purpose. (A11; MPUC Order Granting Petition at 10). The MPUC further explained that U.S. West controlled most of the key information relevant to the proceedings. (A11; MPUC Order Granting Petition at 10).

On May 2, 1997, AWS and U.S. West submitted a matrix of twelve key issues to ALJ Allen Giles and the MPUC. (A15). Those issues included:

1) Access to Service Agreements;
2) Points of Interconnection;
3) Pricing of Services;
4) Application of Access Charges;
5) Reciprocal Compensation/Symmetrical Compensation;
6) Access to Unbundled Network Elements;
7) Items Specific to Paging;
8) Access to Poles, Ducts, Conduits, and Rights of Way;
9) Reciprocal Compensation Effective Date and Rates;
10) Contract Language;
11) Service Quality Standards; and
12) Transit Traffic.

(A15; Positions on Key Issues at 1-7). US West withdrew from its original list of open issues Wide Area Inbound Calling; Access to Numbering Resources; Dialing Parity; and Procedure for Notice of Change, because those issues were no longer in dispute. (A15; Positions on Key Issues at 5).

ALJ Giles presided over the arbitration hearing on May 6 and 7, 1997. (A17-A19). Attorneys for U.S. West, AWS, and the DPS were present, as well as a member of the MPUC staff. (A17; ALJ Hearing Transcript at 2). Eight witnesses were called and various exhibits were entered. (A17-A19). AWS called Kerri M. Landeis, Director of External Affairs for AWS, (A20); Russell Thompson, Director of Network Planning for AWS, (A22); and Dr. Thomas M. Zepp, economist and Vice-President of Utility Resources, Inc., (A25), as expert witnesses. (A17-A18). US West called Thomas G. Londgren, Director of the Minnesota Regulatory Group for U.S. West, (A28); Denyce Jennings, U.S. West's Manager of Wireless Interconnection, (A30); Craig Wiseman, a member of U.S. West's technical staff in the Interconnection Planning Group, (A18; ALJ Hearing at 261); and Dean Buhler, a member of U.S. West's technical staff in Information Technologies, (A18; ALJ Hearing at 312), as expert witnesses. (A17-A19). US West also submitted the rebuttal testimony of Robert Harris, Principal at the Law and Economics Consulting Group and Professor Emeritus of Business and Public Policy in the Haas School of Business, University of California, Berkeley. (A39). The DPS called Susan Peirce, Public Utilities Rates Analyst for the MPUC, as an expert witness. (A40, Ex. A). The parties, including the DPS, submitted post-hearing briefs. (A45-A50). On June 6, 1997, the ALJ issued a Report and Recommended Arbitration Decision. (A51).

In early June, both U.S. West and AWS filed exceptions to the Recommended Arbitration Decision. (A53); (A54). By letter dated June 11, 1997, the DPS noted no exceptions would be filed as the ALJ's recommendations were consistent with the positions advocated by the DPS. (A55). The MPUC heard a staff briefing and oral arguments on June 30 and July 2, 1997.(A57). Pursuant to its vote at the July 2 meeting, the MPUC issued its Order Resolving Arbitration Issues on July 30, 1998.(A58). In its Order, the MPUC took judicial notice of the stayed FCC rules and made the FCC methodologies part of the record. (A58; Order Resolving Arbitration Issues at 2). The MPUC ruled on the following issues:

1) Bill & Keep;
2) Interim Prices;
3) Compensation to AWS from Third-Party Carriers;
***975** 4) Compensation for Traffic Terminated at AWS' Mobile Switching Center (MSC);
5) Access Charges for Intra-Major Trading Area (MTA) Roaming Calls;
6) Compensation for Terminating Paging Calls;
7) Dedicated Paging Facilities;
8) The Effective Date for Reciprocal Compensation;
9) Rates to Be Applied Between Commencement of Reciprocal Compensation and the Issuance of an Order;
10) "Pick and Choose" Option;
11) Points of Interconnection;
12) Limitation on Distance as to Mid-span Meet Point;
13) Collocation of AWS' Remote Switching Units (RSUs) and Digital Loop Carrier Systems (DLCs) at U.S. West's Premises;
14) The Definition of "Collocated Premises";
15) Denial of Access Due to Space Exhaustion;
16) Nondiscriminatory Access to Unbundled Network Elements;
17) Access to Operational Support Systems (OSS);
18) Remedies for Service Quality Violations;
19) Access to Poles, Ducts, Conduits, and Rights of Way;
20) Adoption of Proposed Contract as Template; and
21) Arbitration Costs.

(A58; Order Resolving Arbitration Issues at 4-33). The MPUC ordered the parties to submit a final contract, containing all the arbitrated and negotiated terms, no later that 30 days from the service date of the MPUC's Order. (A58; Order Resolving Arbitration

Issues at 34). On August 27, 1997, the parties submitted a CMRS Interconnection Agreement in accordance with the Order, but expressly reserved all rights in connection with any future challenges to the Order. (A48; Letter of Mark Ayotte at 2). The parties were unable to resolve the issue of special construction for interconnection facilities and therefore submitted two alternative versions for the portion of the Agreement addressing that issue. (A48; Letter of Mark Ayotte at 2).

On August 11, 1997, AWS filed a Petition for Reconsideration. (A59). On September 18, 1997, the Petition for Reconsideration and the Proposed Contract came before the MPUC. (A66; Order Resolving Issues After Reconsideration at 1). On September 29, 1997, the MPUC issued its Order Resolving Issues After Reconsideration, Examining Interconnection Agreement, and Requiring Compliance Filing. (A66). In that Order, the MPUC granted in part and denied in part AWS' Petitions for Reconsideration; the MPUC was persuaded that the compensation rate for AWS-terminated traffic should be the tandem switching rate rather than calculated on a per call basis. (A66; Order Resolving Issues After Reconsideration at 3, 11). The MPUC also corrected an error in its calculation of prices. (A66; Order Resolving Issues After Reconsideration at 4). The MPUC adopted the language submitted by AWS concerning special construction for interconnection facilities as the final contract language. (A66; Order Resolving Issues After Reconsideration at 11). The MPUC required a few further amendments and modifications to the Agreement, such as the addition of a notice provision and a provision concerning U.S. West Dex. (A66; Order Resolving Issues After Reconsideration at 6-11). The MPUC found the rest of the agreement to be generally consistent with the federal Act, Minnesota law, and the public interest. (A66; Order Resolving Issues After Reconsideration at 6).

The MPUC ordered the parties to submit a final contract that complied with its Order within 30 days; the MPUC noted ***976** that a final contract with the proposed modifications would meet all applicable legal requirements, and therefore would be approved and effective as of September 18, 1997. (A66; Order Resolving Issues After Reconsideration at 11). The final U.S. West-AWS Agreement was filed with the MPUC on October 30, 1997.(A68). On December 15 and March 4, 1998, the MPUC issued two memorandums noting that the parties filed an Agreement that complied with its Order of September 29, 1997.(A69); (A73).

On March 13, 1998, pursuant to 47 U.S.C. § 252(e)(6), U.S. West filed the instant action seeking review of the MPUC's Orders. US West alleges nine counts in its complaint: (1) Count I, the MPUC violated U.S. West's due process rights and the dictates of the Act and Minnesota law by placing the burden of proof on U.S. West; (2) Count II, the MPUC violated 47 U.S.C. §§ 252(b)(1) and (b)(4)(A) by considering issues not included in AWS' petition or U.S. West's response; (3) Count III, the MPUC violated 47 U.S.C. § 252(d)(2) and (d)(A)(ii) by treating AWS's Mobile Switching Center ("MSC") as a tandem switch for the purpose of compensation; (4) Count IV, the MPUC violated 47 U.S.C. § 251(c)(6) when it required U.S. West to collocate RSUs and DLCs on its premises; (5) Count V, the MPUC violated 47 U.S.C. § 252(i) by ordering the inclusion of a provision in the Interconnection Agreement referencing the "unsettled state of the law" concerning the "pick and choose" rule; (6) Count VI, the MPUC violated § 251(c)(2) when it ordered U.S. West to provide interconnection at any technically feasible point, even if construction is involved; (7) Count VII, the MPUC exceeded its authority when it imposed conditions on U.S. West Dex; (8) Count VIII, the MPUC exceeded its authority under § 252(b)(4)(C) and (c) of the Act when it imposed requirements not expressly contained in the Act or state law; and (9) Count IX, the MPUC violated the Takings Clause by taking U.S. West's property without just compensation.

II. OPERATIONAL SUPPORT SYSTEMS AS AN OPEN ISSUE

US West argues that the MPUC improperly

required U.S. West to provide AWS access to its operational support systems ("OSS"). US West alleges the MPUC had no authority to require this access because this was not an open issue before the MPUC.

[1] Section 252(c) ("Standards for arbitration") states that:

> In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall-
> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 U.S.C. § 252(c) (emphasis added). Standing alone, this provision could arguably be read as ambiguous concerning the MPUC's ability to impose any condition of its choosing. However, when read in conjunction with 47 U.S.C. § 252(b) ("Agreements arrived at through compulsory arbitration"), there is a clear indication that any condition that the MPUC decides to impose on the agreement must relate to an "open issue," that is an issue raised by the parties themselves. Section 252(b)(4)(A) states that "[t]he State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any ...." This subsection indicates that the MPUC cannot independently ***977** raise an issue not raised by one of the parties. This interpretation is further reinforced by subsection (b)(4)(C) which states that "[t]he State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement ...." In this context, the imposition of conditions is expressly limited to resolving open issues. Therefore, § 252(c) cannot be read as a grant of authority to a state commission to impose any requirement of its choosing; under § 252(c) state commissions are limited to arbitrating open issues.

The MPUC and AWS argue, in turn, that the issue of access to unbundled network elements was clearly before the MPUC as an open issue and that because the OSS is a network element to be made available to new entrants on an unbundled basis according to 47 C.F.R. § 15.319, the issue of access to the OSS was also clearly before the MPUC.

After the MPUC issued its order and the parties submitted their briefs in this case, the Supreme Court vacated § 15.319. AT&T Corp., 525 U.S. at ----, 119 S.Ct. at 736. The Supreme Court stated that the FCC, in determining which network elements an incumbent LEC must make available, should give greater weight to the terms "necessary" and "impair" in § 252(d)(2). Id. The issue of access to OSS was an open issue only to the extent it could be considered a network element to be made available on an unbundled basis. In light of the Supreme Court's decision vacating 47 C.F.R. § 15.319, whether OSS can be considered an unbundled network element is now in doubt and § 15.319 cannot serve as the basis for its being considered such. Because the singular basis asserted by the MPUC for its considering access to OSS an open issue has now been removed by the Supreme Court, this Court concludes that the MPUC lacked authority under § 252(c) to require U.S. West to make access to its OSS available to AWS. This issue is remanded to the MPUC for further consideration in light of this Order. [FN4]

> FN4. As was noted by the Eastern District of North Carolina, the Act does not explain what should occur if a district court finds that an Interconnection Agreement violates the Act. AT & T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F.Supp.2d 661, 668 (E.D.N.C.1998). Given the appellate nature of the proceeding, a remand to the state commission is the most appropriate option. Id.

III. TANDEM TRANSPORT AND

TERMINATION

US West argues that a provision of the Agreement imposed by the MPUC unlawfully compensates calls terminated at AWS's MSC at the tandem switching rate. US West alleges that the MPUC failed to consider actual function, that is that the MSC actually operates like an end-office switch rather than a tandem switch, in making its determination.

Section 251(b)(5) of the Act directs that all local exchange carriers are obligated to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). The terms and conditions for reciprocal compensation must be just and reasonable and, to meet this standard, they must allow for the recovery of a reasonable approximation of the "additional cost" of transporting and terminating a call begun on another carrier's network. 47 U.S.C. § 252(d)(2)(A). The FCC found that the "additional cost" will vary depending on whether or not a tandem switch is involved. First Report and Order, ¶ 1090. The FCC, therefore, determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. Id. The FCC directed state commissions to "consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's ***978** tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." Id. The FCC further instructed that where the new carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the new carrier's costs is the LEC tandem interconnection rate. First Report and Order, ¶ 1090; 47 C.F.R. § 51.711(a)(3). [FN5] Therefore, in order to evaluate whether a switch performs as a tandem switch, it is appropriate to look at both the function and geographic scope of the switch at issue.

FN5. The Eighth Circuit vacated 47 C.F.R. § 51.711(a)(3) on the ground that the FCC lacked jurisdiction to issue pricing rules. Iowa Utils. Bd., 120 F.3d at 800, 819 n. 39. However, the Supreme Court reversed this determination and reinstated the FCC's pricing rules, including 47 C.F.R. § 51.711, finding that "the Commission has jurisdiction to design a pricing methodology." AT&T Corp., 119 S.Ct. at 733.

Whether a switch performs as a tandem or end-office switch is a factual determination that has been expressly delegated to the state commissions by the FCC. Because this is a question of fact, the MPUC's determination is reviewed using the arbitrary and capricious standard of review. AT & T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998) (order denying motions to dismiss and determining standard of review); see TCG Milwaukee, Inc. v. Public Service Commission of Wisconsin, 980 F.Supp. 992, 1004 (W.D.Wis.1997).

The fundamental technical differences between wireless and landline telephone systems greatly complicate the comparison of the functions of their component elements. It is to some extent like comparing the proverbial apples and oranges.

Russell Thompson, Director of Network Planning for the Western Region of AWS, testified that the MSC performs duties similar to both a tandem and an end- office switch. (A23; Rebuttal Testimony of Russell Thompson at 1). Thompson described landline networks as being characterized by hierarchical switching centers with both tandem and end-office switches often being involved in the routing of calls. (A23; Rebuttal Testimony of Russell Thompson at 2). Wireless networks were explained as being hierarchical involving IS 41 Tandems, Cell Site Control ("CSC") switches, and cell sites in the routing of calls. (A23; Rebuttal Testimony of Russell Thompson at 2). The IS 41 and CSC are both located in the MSC. (A23; Rebuttal Testimony of Russell Thompson at 2). The CSC switches and cell sites together perform end office-like functions, (A23; Rebuttal

Testimony of Russell Thompson at 7-8), while the IS 41 Tandem provides tandem-switch functions. (A23; Rebuttal Testimony of Russell Thompson at 3). "[T]andem switching systems perform trunk switching and generally provide two basic network functions--traffic concentration and centralization of services." (A23; Rebuttal Testimony of Russell Thompson at 9 (citing BOC Notes on Network, Section 4, Network Design and Configuration, 4.1.3.3, Tandem Switching Systems, pp. 4-6)). Thompson testified that the IS 41 Tandem performs both these functions. (A23; Rebuttal Testimony of Russell Thompson at 9).

Thomas Zepp, economist and Vice President of Utility Resources, Inc., confirmed Thompson's assessment that the MSC functions as a tandem switch. (A25; Direct Testimony of Thomas Zepp at 38-41). Zepp gave a number of examples as to how a MSC performs tandem functions, for example storing the location of and tracking a wireless customer in a "Home Location Register," routing calls to another MSC while a customer is in transit, and routing phone calls to a landline in the most cost-effective manner. (A25; Direct Testimony of Thomas Zepp at 38-40).

US West, in turn, presented strong evidence that the MSC functions as an end- ***979** office switch rather than a tandem switch. (A42; Direct Testimony of Craig Wiseman at 9). US West's expert Craig Wiseman, a member of U.S. West's technical staff in the Interconnection Planning Group, testified that the MSC only connected AWS subscribers to each other or to other local service provider networks in order to deliver calls to or receive calls from AWS subscribers. (A42; Direct Testimony of Craig Wiseman at 9). AWS depends on U.S. West tandems to send calls to or receive calls from the vast majority of subscribers in Minnesota and the rest of the United States. (A42; Direct Testimony of Craig Wiseman at 9). Wiseman also testified that other wireless companies, such as GTE Mobilenet, SouthWestco, and Aliant, had recognized their switching offices as end offices in arbitrated agreements, and that other state arbitration panels had determined that wireless companies are not entitled to tandem switching and transport compensation. (A42; Directory of Craig Wiseman at 13).

On the issue of the geographic scope of the switches, there was evidence that the MSC serves a geographic area similar to that of a landline tandem switch. US West's tandem switches are limited by the LATA [FN6] boundaries in Minnesota and therefore there are several tandem switches within the state. (A18; ALJ Hearing at 209-10). AWS' MSC directly serves sixty-six percent of Minnesota's population. (A17; ALJ Hearing at 33). Although percentage of population is not precise as to geographic area covered, it indicates that the MSC covers at least an area comparable to one of Minnesota's LATAs and therefore covers an area comparable to a U.S. West tandem switch. US West argues that AWS' MSC fails to reach the same geographic area as all of U.S. West's tandem switches. (A42; Direct Testimony of Craig Wiseman at 11- 12). However, that comparison is irrelevant. The issue is not whether the MSC covers the same geographic area as all of the tandem switches in Minnesota, but rather whether it covers the same geographic area as one tandem switch.

FN6. A Local Access and Transport Area ("LATA") is "a contiguous geographic area" established by a Bell operating company pursuant to a consent decree. 47 U.S.C. § 153(25). Generally a state will have more than one LATA.

[2] Based on the evidence before the ALJ and the MPUC, it appears that the MSC performs functions comparable to both end-office and tandem switches. Although there was conflicting evidence concerning the function of the MSC, the testimony of Thompson and Zepp provided a sufficient basis for the MPUC's finding that the MSC performs a tandem switch function. [FN7] This is particularly true in light of the FCC's admonition to consider the capabilities of new technology such as wireless networks. While there may be no exact corollaries between the wireless and landline systems, there is

evidence to suggest that the MSC has capabilities and reach that are of a certain equivalence to a tandem switch. The evidence also indicates that the MSC covers a geographic area comparable to that covered by a tandem switch. Pursuant to the FCC rules, this alone provides sufficient grounds for a finding that the appropriate rate for the MSC is the tandem switch rate. [FN8]

FN7. US West indicated that the MPUC should have been limited by the definition of tandem switch found in 47 C.F.R. § 51.319(c)(2). However, since the MPUC made its decision, 47 C.F.R. § 51.319 was vacated by the Supreme Court. AT&T Corp., 119 S.Ct. at 736. US West's argument is now moot in light of the Supreme Court's recent decision.

FN8. The MPUC stated that it did not base its final decision on FCC Rule 51.711(a)(3) and the geographic reach of the switches, although its preliminary ruling may have taken geographic reach into consideration. (MPUC's Brief at 4). Even though the MPUC may not have relied on FCC Rule 51.711(a)(3), the reinstated rule and the comparable geographic reach of the switches reinforces the MPUC's final decision.

The MPUC's finding that calls terminated at AWS's MSC should be compensated ***980** at the tandem switching rate is not arbitrary and capricious.

IV. COLLOCATION OF EQUIPMENT

US West argues that the MPUC erred by requiring U.S. West to permit AWS to physically collocate RSUs on U.S. West's premises because such equipment is not necessary for access to unbundled network elements under § 251(c)(6). [FN9]

FN9. US West briefed only the issue of collocating RSUs, although its complaint referenced both RSUs and DLCs in connection with this issue.

Section 251(c)(6) states that an incumbent LEC has a duty to provide "for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier ...." 47 U.S.C. § 251(c)(6) (emphasis added). The FCC found that § 251(c)(6) "generally requires that incumbent LECs permit the collocation of equipment used for interconnection or access to unbundled network elements." First Report and Order, ¶ 579. In reaching that conclusion, the FCC interpreted and defined the term "necessary": "Although the term 'necessary,' read most strictly, could be interpreted to mean 'indispensable,' we conclude that for the purposes of section 251(c)(6) 'necessary' does not mean 'indispensable' but rather 'used' or 'useful.' " Id. The FCC decided that a more expansive interpretation of the term "necessary" would further the competitive motivation behind the Act. Id.

The FCC then determined whether specific equipment could or could not be collocated on the incumbent LEC's premises, essentially deciding whether the equipment is "useful" for interconnection or access to unbundled elements. Id. ¶ 580-82. Concerning the collocation of switching equipment, the FCC stated:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute, that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

Id. ¶ 581. The FCC left the factual determination as to whether "switching equipment" is used for interconnection to the discretion of the state commissions.

When allotting the burden of proof, the FCC placed the burden on the incumbent LEC to prove that specific equipment is not "necessary," meaning useful, for interconnection to unbundled network elements. Id. ¶ 580. In explaining this standard, the FCC stated that: